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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION EIGHT

LISA FISHER, Plaintiff and Appellant, v. ROBIN RODRIGUEZ et al., Defendants and Respondents.	B224940 (Los Angeles County Super. Ct. No. BC420394)

APPEAL from orders of the Superior Court of Los Angeles County. Zaven V. Sinanian, Judge. Affirmed.

Lisa Fisher, in pro per, for plaintiff and appellant.

Waxler, Carner Brodsky, Barry Z. Brodsky and Christopher L. Wong, for Defendants and Respondents.

Plaintiff and appellant Lisa Fisher, the former attorney of decedent Rami Rodriguez, appeals from an order dismissing her complaint for defamation against defendants and respondents Steven H. Haney and the law firm of Haney, Buchanan & Patterson (collectively the "attorney defendants"); Fisher also appeals from a subsquent order denying her motion for reconsideration of the prior order. Plaintiff principally contends: (1) the alleged defamation did not arise from a constitutionally protected activity and (2) the litigation privilege is inapplicable. We affirm.

FACTUAL AND PROCEDURAL BACKGROUND

Robin Rodriguez married successful businessman Rami Rodriguez in 2000. (We refer to the Rodriguez's by their first names.) Several years later, Rami began to show signs of severe dementia. In October 2003, Rami's brother removed Rami from the marital home against Robin's wishes. In the ensuing conservatorship proceedings, Rami's niece and Robin vied to be appointed Rami's conservator. The probate court appointed appellant Fisher to represent Rami in the conservatorship proceedings. Shortly before the trial in the conservatorship proceedings the court appointed another attorney as co-counsel to Fisher. In October 2004, the probate court appointed a neutral and independent conservator, as Fisher and her co-counsel had requested. Rami died a year later. Subsequently, on behalf of Robin as the executor of Rami's estate, the attorney defendants brought an action against Fisher and her co-counsel for breach of fiduciary duty and other related claims. In July 2009, the trial court granted Fisher's anti-SLAPP motion to strike the complaint in that case, finding that the acts complained of occurred in the course of Fisher advocating for Rami during the conservatorship proceeding.[1] Division Two of this court affirmed that order in an unpublished opinion. (*Rodriguez v. Hinojosa* (June 2, 2011, B218594 [nonpub. opn.])

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[1] The acronym "SLAPP" was coined by professors at the University of Denver and has been adopted by our Supreme Court. (*Navellier v. Sletten* (2002) 29 Cal.4th 82, 85, fn. 1 (*Navellier*).)

In August 2009, Fisher filed the instant action against Robin and the attorney defendants. The operative complaint alleged causes of action for defamation, intentional interference with prospective economic advantage, intentional infliction of emotional distress and unfair business practices. Paragraph 18 of the complaint states that the action "arises from publications and statements set forth in [*Rodriguez v. Hinojosa*]. Defendants, and each of them, have attempted to subject [Fisher] to ruin by publishing false and defamatory accusations against [Fisher] in said documents and through publication and republication of said claims." The gravamen of the action is that in the complaint and other pleadings in *Rodriguez v. Hinojosa*, the attorney defendants alleged Fisher "is incompetent, and upon information and belief, suffers from a mental defect that impedes her ability to practice law, substantively and ethically. Notably, less than one month before the original conservatorship trial date, and at hearing, pleaded with the court in near hysterics." According to Fisher, that statement had no basis in fact and was made with the intent to attack and degrade her reputation. "Further, in light of the allegation being made in court pleadings, it was made to hold [Fisher] to ridicule with the probate community, the probate court, and other courts where her name was in good standing. It is meant to diminish her esteem, respect, goodwill and/or confidence in which [Fisher] is held, or to excite adverse, derogatory or unpleasant feelings or opinions against her by her colleagues and potential clients and the general public at large."

On January 8, 2010, the attorney defendants in this case filed an anti-SLAPP motion.[2] The motion argued: (1) the complaint arose from protected activity (i.e. the filing and prosecution of *Rodriguez v. Hinojosa*); (2) the challenged conduct was

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[2] Robin is not a party to this appeal. Although named as a defendant in the complaint filed by Fisher, she did not file her own anti-SLAPP motion, and the trial court denied her request to join the attorney defendants' motion. Robin's subsequent motion for judgment on the pleadings was denied. At Fisher's request, we take judicial notice of the Reporter's Transcript of the June 28, 2010 hearing on that motion, as well as the minute order denying the motion and Fisher's notice of ruling. (Evid. Code, §§ 452, subd. (d); 459.)

protected by the litigation privilege (Civ. Code, § 47); and (3) therefore there was no likelihood that Fisher would prevail on the complaint.

In opposition to the anti-SLAPP motion, Fisher argued the complaint did not arise out of protected activity because it did not seek to hold the defendants liable for filing *Rodriguez v. Hinojosa*; but rather for conspiring to defame Fisher. According to Fisher, the complaint was simply the "tool" used by the defendants to publish the defamatory statements. Fisher maintained the litigation privilege did not apply because the statement that she had a "mental defect" was neither logically related nor in furtherance of the object of the litigation. Finally, Fisher argued the anti-SLAPP motion was untimely because it was not brought within 60 days of the date her original complaint was filed and it was irrelevant that she filed an amended complaint.

The motion was heard on February 9, 2010. The trial court granted the attorney defendants' anti-SLAPP motion and awarded them attorney fees and costs. The trial court subsequently denied Fisher's motion for reconsideration. Fisher timely appealed.

DISCUSSION

A. Standard of Review

" 'Review of an order granting or denying a motion to strike under section 425.16 is de novo. [Citation.] We consider "the pleadings, and supporting and opposing affidavits . . . upon which the liability or defense is based." ([Code Civ. Proc.,]§ 425.16, subd. (b)(2).) However, we neither "weigh credibility [nor] compare the weight of the evidence. Rather, [we] accept as true the evidence favorable to the plaintiff [citation] and evaluate the defendant's evidence only to determine if it has defeated that submitted by the plaintiff as a matter of law." [Citation.]' [Citations.]" (*Nygard, Inc. v. Uusi-Kerttula* (2008) 159 Cal.App.4th 1027, 1036.)

B. The Complaint Arises From Protected Activity Within the Meaning of the Anti-SLAPP Statute

Fisher contends the complaint in this case does not fall within the anti-SLAPP statute because defamation is not a constitutionally protected activity.[3] In particular, that "making statements and republishing said statements that [Fisher] suffers from a 'mental defect,' do not 'arise from' protected activity." We find no error.

Modern public policy seeks to encourage free access to the courts and finality of judgments by limiting derivative tort claims arising out of litigation-related misconduct and by favoring, instead, the imposition of applicable sanctions within the original lawsuit. (*Rusheen v. Cohen* (2006) 37 Cal.4th 1048, 1063 (*Rusheen*).) It does so at the expense of narrowing the scope of torts such as abuse of process, spoliation of evidence, malicious prosecution, intentional infliction of emotional distress and civil actions for perjury. (*Ibid*.) One tool used to accomplish the goal of free access to the courts and finality of judgments is the anti-SLAPP motion.

The anti-SLAPP statute provides a procedural remedy to dispose of lawsuits that are brought to chill the valid exercise of constitutional rights. (*Rusheen, supra*, 37 Cal.4th at pp. 1055-1056.) Evaluation of an anti-SLAPP motion is a two step process. First, the trial court must determine whether the defendant has shown that the challenged cause of action arises from *protected activity*. Second, it must determine whether the plaintiff has demonstrated a reasonable probability of prevailing on the claim. (*Id*. at p. 1056.)

Within the meaning of the anti-SLAPP statute, *protected activity* means any act "in furtherance of the person's right of petition or free speech under the United States Constitution or the California Constitution in connection with a public issue . . . ." (Code Civ. Proc., § 425.16, subd. (b)(1).) Protected activity includes any written or oral

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3 The elements of the tort of defamation are: (1) a publication that is (2) false, (3) defamatory, and (4) unprivileged, and that (5) has a natural tendency to injure or that causes special damage. (Civ. Code, §§ 44, 45, 46; *Smith v. Maldonado* (1999) 72 Cal.App.4th 637, 645; see 5 Witkin, Summary of Cal. Law (9th ed. 1990) Torts, § 529.)

statement or writing made before a judicial proceeding or in connection with an issue under consideration or review by a judicial body, or any other official proceeding authorized by law. (Code Civ. Proc., § 425.16, subd. (e).) Filing a lawsuit is an act in furtherance of a person's right of petition. (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67.) The validity of that lawsuit is immaterial. For example, in *Jarrow Formulas, Inc. v. LaMarche* (2003) 31 Cal.4th 728, 739 (*Jarrow*), the court held that filing or maintaining a lawsuit without probable cause was nevertheless an exercise of the right to petition; accordingly, a malicious prosecution action based on filing or maintaining a lawsuit without probable cause was subject to the anti-SLAPP statute. (But see *Novartis Vaccines and Diagnostics, Inc. v. Stop Huntingdon Animal Cruelty USA, Inc.* (2006) 143 Cal.App.4th 1284, 1294-1295 [anti-SLAPP statute cannot be invoked to protect activity that the defendant concedes or the evidence conclusively establishes was illegal as a matter of law, such as harassment, infliction of emotional distress, intrusion and trespass], citing *Flatley v. Mauro* (2006) 39 Cal.4th 299, 320 [extortion is not constitutionally protected].)

The anti-SLAPP statute does not apply to causes of action arising out of private communications about private matters between private parties. (*Weinberg v. Feisel* (2003) 110 Cal.App.4th 1122, 1132 [where defendant's theft accusation was not intended to result in criminal investigation or prosecution of plaintiff, accusation was not a protected activity], disapproved of on another point in *Kibler v. Northern Inyo County Local Hospital Dist.* (2006) 39 Cal.4th 192, 203, fn. 5.) But, contrary to appellant's assertion, a defamation suit can be a SLAPP. (*Hecimovich v. Encinal School Parent Teacher Organization* (2012) 203 Cal.App.4th 450, 464 [allegedly defamatory statements concerned matter of public interest].) Where the defamatory statement is alleged to have occurred in the context of an act in furtherance of the plaintiff's right to petition, it is unnecessary to prove that the statement also concerned a matter of public interest. For example, in *Dible v. Haight Ashbury Free Clinics, Inc.* (2009) 170 Cal.App.4th 843 (*Dible*), Dible was employed by the Free Clinic as a psychotherapist. After one of her patients (a jail inmate) committed suicide, Dible was terminated. Dible brought an action

against the Free Clinic on various theories, the basis of which was that she was wrongfully terminated for the "false reason" that she was responsible for the suicide. The defamation cause of action was based on the allegation that, in response to her unemployment insurance claim, the Free Clinic had advised the Employment Development Department of the State of California (EDD) that she was responsible for the inmate's death. The trial court granted the Free Clinic's anti-SLAPP motion to the defamation cause of action. The appellate court affirmed reasoning that the allegedly defamatory statements were made by the Free Clinic in an official proceeding – the EDD evaluation of Dible's unemployment insurance claim – and as such the statements constituted protected activity. (*Id*. at pp. 849-850; see also *Fontani v. Wells Fargo Investments, LLC* (2005) 129 Cal.App.4th 719, 725-726 (*Fontani*) [defendant-employer's communication to the National Association of Securities Dealers of its version of the plaintiff-employee's discharge was a protected activity].)

Here, the allegedly defamatory statement was made by the attorney-defendants in the complaint and other pleadings in *Rodriguez v. Hinojosa*. Under the reasoning of *Dible* and *Fontani*, making such statements in the context of filing and prosecuting *Rodriguez v. Hinojosa* was an exercise of the right to petition.

C. The Litigation Privilege Applies to the Allegedly Defamatory Statements

We next turn to the second part of the anti-SLAPP motion: Has Fisher demonstrated a likelihood of success on the merits. We conclude she has not because the statements in issue are protected by the litigation privilege (Civ. Code, § 47, subd. (b)). Fisher argues the litigation privilege is inapplicable because the statements, although made in the complaint filed in *Rodriguez v. Hinojosa*, were "of a vindictive nature which has nothing to do with the objects of the litigation."

Civil Code section 47, subdivision (b), codifies the litigation privilege and defines a "privileged publication" as, among other things, one made in any judicial proceeding. " 'The purposes of section 47, subdivision (b), are to afford litigants and witnesses free access to the courts without fear of being harassed subsequently by derivative tort

actions, to encourage open channels of communication and zealous advocacy, to promote complete and truthful testimony, to give finality to judgments, and to avoid unending litigation.' [Citations.]" (*Alpha & Omega Development, LP v. Whillock Contracting, Inc.* (2011) 200 Cal.App.4th 656, 664 (*Alpha*), citing *Rusheen, supra*, 37 Cal.4th at p, 1063). The privilege was originally enacted in reference to defamation actions. (*Alpha,* at p. 664.) It has been extended to all torts except malicious prosecution. (*A.F. Brown Elec. Contractor, Inc. v. Rhino Elec. Supply, Inc.* (2006) 137 Cal.App.4th 1118, 1126.)[4] The privilege applies regardless of whether the statement was made with malice or the intent to harm. (*Ibid*; see also *Rubin v. Green* (1993) 4 Cal.4th 1187, 1193 [the only exception to application of the litigation privilege to tort suits is malicious prosecution].) In *Rusheen*, our Supreme Court held that the litigation privilege applied even to perjured declarations of service because they are " '(1) made in judicial or quasi-judicial proceedings; (2) by litigants or other participants authorized by law; (3) to achieve the objects of the litigation; and (4) that have some connection or logical relation to the action.' [Citation.]" (*Id*. at p. 1062.) "To come within the privilege, the fact communicated itself must have some bearing or connection with the subject matter of the litigation." (*Younger v. Solomon* (1974) 38 Cal.App.3d 289, 302 (*Younger*).)

Here, the causes of action for fraudulent concealment and non-disclosure, negligence and breach of fiduciary duty in *Rodriguez v. Hinojosa* were based on the allegation that Fisher and her co-counsel intentionally concealed a doctor's report which contained material facts of consequence to the determination of the conservatorship proceedings. The allegedly defamatory statement, first published in the complaint in *Rodriguez v. Hinojosa*, is that Fisher "is incompetent, and upon information and belief, suffers from a mental defect that impedes her ability to practice law, substantively and ethically. Notably, less than one month before the original conservatorship trial date, and at hearing, pleaded with the court in near hysterics." The challenged statement concerns Fisher's competence and performance in the practice of law, which are logically related

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4 Fisher has not alleged a cause of action for malicious prosecution.

to the action for negligence and breach of fiduciary duty. As such, they are protected by the litigation privilege, and the anti-SLAPP motion was properly granted.[5]

Appellant's reliance on *McDonald v. Smith* (1985) 472 U.S. 479, for a contrary result is misplaced. In that case, while Smith, a former judge, was being considered for the position of United States Attorney, McDonald wrote two letters to President Reagan accusing Smith of violating the civil rights of litigants, fraud, extortion or blackmail and violation of professional ethics. After Smith was not appointed, he filed a libel action against McDonald. The United States Supreme Court held that the constitutional right to petition does not include a right to commit libel with impunity. (*Id*. at p. 485.) *McDonald* is inapposite to this case because the issue here is not whether allegedly defamatory statements are constitutionally protected (they are not), it is whether they fall procedurally within the anti-SLAPP statute and substantively where they are protected by the litigation privilege, which they are.

DISPOSITION

The judgment is affirmed. Respondents shall recover their costs on appeal.

RUBIN, ACTING P. J.

WE CONCUR:

FLIER, J.

GRIMES, J.

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5 Fisher also contends the trial court erred in overruling some of her evidentiary objections to declarations submitted by the attorney defendants in support of the anti-SLAPP motion, and that the attorney fees order should be reversed if the order granting the anti-SLAPP motion is reversed. Because we affirm the order granting the anti-SLAPP motion, the attorney fees contention is moot. Regarding the trial court's evidentiary rulings, Fisher does not explain how the evidence was inadmissible other than to state in conclusory fashion that the "statements are objectionable on their face," nor does she demonstrate a reasonable probability of a more favorable result had the trial court sustained all of her evidentiary objections. Under these circumstances, reversal is not warranted. (Evid. Code, § 353.)